

FEDERAL CIRCUIT COURT OF AUSTRALIA

*LE v MINISTER FOR IMMIGRATION,
CITIZENSHIP, MIGRANT SERVICES AND
MULTICULTURAL AFFAIRS & ANOR*

[2019] FCCA 2323

Catchwords:

MIGRATION – Review of decision by Administrative Appeals Tribunal – whether Administrative Appeals Tribunal’s decision affected by jurisdictional error – whether Administrative Appeals Tribunal’s findings were open to it – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 31, 65, 338, 357A, 359AA, 359A, 360, 474, 476

Migration Regulations 1994 (Cth), regs.1.15A, 2.01

Cases cited:

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

SZBEL v Minister for Immigration and Citizenship (2006) 228 CLR 152

SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609 (HCA 26)

ARG15 v Minister for Immigration and Border Protection [2016] FCAFC 174

Applicant:

MARY LE

First Respondent:

MINISTER FOR IMMIGRATION,
CITIZENSHIP, MIGRANT SERVICES
AND MULTICULTURAL AFFAIRS

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:

SYG 2270 of 2017

Judgment of:

Judge Emmett

Hearing date:

13 August 2019

Date of Last Submission:

13 August 2019

Delivered at:

Sydney

Delivered on:

13 August 2019

REPRESENTATION

Counsel for the Applicant: Mr Ashok Kumar

Solicitors for the Applicant: Vietaust Lawyers

Counsel for the Respondents: Mr Hamish Bevan

Solicitors for the Respondents: HWL Ebsworth Lawyers

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 2270 of 2017

MARY LE

Applicant

And

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

EX TEMPORE

REASONS FOR JUDGMENT

1. This is an application pursuant to s.476 of the *Migration Act 1958* (Cth) (“**the Act**”) for judicial review of a decision of the Administrative Appeals Tribunal dated 30 June 2017 (“**the Tribunal**”), affirming a decision of a delegate of the first respondent (“**the Delegate**”) made on 29 August 2016 refusing the grant of a Partner (Provisional) (Class UF) visa.
2. On 26 August 2015, Mr Toan Duy Do (“**the Visa Applicant**”) lodged a partner visa application on the grounds of being in a spousal relationship with an Australian citizen, Ms Mary Le, who was the Visa

Applicant's sponsor in that application. Following the Delegate's refusal to grant the Visa Applicant a partner visa, the Visa Applicant's sponsor, Ms Le, lodged an application for review of the Delegate's decision with the Tribunal. Ms Le, as the applicant seeking review of the Delegate's decision, was described as the "*review applicant*" before the Tribunal ("**the Review Applicant**"). The Visa Applicant's two children from a previous marriage were also included in his application for a partner visa.

Background

3. On 5 July 2015, the Visa Applicant lodged an application for a partner visa with the Department of Immigration and Border Protection ("**the Department**").
4. On 29 August 2016, the Delegate refused the grant of a partner visa to the Visa Applicant and his two children from a previous marriage.
5. On 22 September 2016, the Review Applicant lodged an application for review of the Delegate's decision by the Tribunal.
6. On 30 June 2017, the Tribunal handed down its decision affirming the decision of the Delegate not to grant the Visa Applicant a partner visa.
7. On 19 July 2017, the Review Applicant filed an application in this Court seeking judicial review of the Tribunal's decision.

Legislative framework

8. Pursuant to s.65(1)(a) of the Act, if satisfied of a number of matters, the first respondent may grant a visa. Section 65(1)(b) of the Act provides that, if the first respondent is not satisfied about those matters, then the Minister must refuse to grant the visa.
9. Section 31(1) of the Act provides that there are to be prescribed classes of visa. One class of visa is a partner visa (reg.2.01 of the *Migration Regulations 1994* (Cth) ("**the Regulations**") and Schedule 1 to the Regulations).
10. Under s.338 of the Act, a decision to refuse to grant a partner visa is a decision which may be reviewed by the second respondent.

11. The requirements of the natural justice hearing rule are exhaustively stated in Division 5 of Part 5 of the Act (s.357A of the Act). Division 5 Part 5 includes ss.359A and 360, which provide that:

“359A Information and invitation given in writing by Tribunal

(1) Subject to subsections (2) and (3), the Tribunal must:

(a) give to the Applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.

360 Tribunal must invite Applicant to appear

(1) The Tribunal must invite the Applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.”

12. Section 359AA of the Act permits the Tribunal to give orally to an applicant clear particulars of any information that the Tribunal considers would be the reason or part of the reason for affirming the decision under review. The Tribunal must ensure that the applicant understands the relevance of the information and the consequences of any information being relied upon. The Tribunal must also invite the applicant to comment on or respond to the information and advise the applicant that the applicant may seek additional time to comment on or respond to the information.
13. However, a purported decision of the second respondent which is affected by jurisdictional error is not a decision which is made under the Act and therefore is not a privative clause decision (see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476).
14. Section 5F of the Act defines “spouse” as follows:

“Spouse

(1) For the purposes of this Act, a person is the spouse of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a married relationship if:

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.”

15. Regulation 1.15A of the *Migration Regulations 1994* (Cth) (“**the Regulations**”) sets out the arrangements for determining whether the Review Applicant is the spouse of her husband, the Visa Applicant. Regulation 1.15A is as follows:

“1.15A Spouse

(1) For subsection SF (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs SF (2) (a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

(a) a Partner (Migrant) (Class BC) visa; or

(b) a Partner (Provisional) (Class UF) visa; or

(c) a Partner (Residence) (Class BS) visa; or

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married to each other; and

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities; and

(d) the nature of the persons' commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3)."

The Delegate's decision

16. On 29 August 2016, the Delegate refused the Visa Applicant's application for a partner visa on the basis that the Visa Applicant did not meet the definition of "spouse" in s.5F of the Act.
17. The Delegate noted that the Visa Applicant must satisfy cl.309.211 of Schedule 2 of the Regulations at the time of application. Clause 309.211(2) of the Regulations requires that the visa applicant be, at the time of application, the spouse or de facto partner of the sponsoring spouse. The definition of spouse is contained in s.5F of the Act and set out above.
18. In summary, the Delegate considered the issue before it to be whether the Review Applicant and the Visa Applicant had a mutual commitment to a shared life, a genuine and continuing relationship, and lived together or not lived separately and apart on a permanent basis.
19. Further, reg.1.15A of the Regulations makes provision for determining whether the conditions of s.5F of the Act exist.
20. With regards to the financial aspects of the relationship, and given the Visa Applicant and the Visa Applicant live in separate countries, the Delegate recognised the difficulty in combining financial affairs and therefore gave little weight to that factor in the consideration of the partner visa application.
21. In assessing the nature of the household, the Delegate similarly recognised the difficulty imposed by living in separate countries and gave little weight to that factor in the consideration of the partner visa application.

22. In regards to the social aspects of the relationship, the Delegate considered the evidence and material submitted including, but not limited to, photographs of social occasions and witness statements. The Delegate gave limited weight to that evidence in favour of firsthand evidence from the Review Applicant and the Visa Applicant.
23. The Delegate subsequently considered the nature of the Review Applicant and the Visa Applicant's commitment to each other. The Delegate was not satisfied that the parties' decision to marry after spending such a limited time together in a relationship reflected the level of consideration that was commensurate with the seriousness attached to a decision between two persons making a genuine and lifelong commitment to each other.
24. Further, the Delegate considered that the evidence indicated that the Visa Applicant had undertaken a divorce of convenience for the purpose of lodging the partner visa application.
25. The Delegate noted significant discrepancies between the Visa Applicant's accounts at interview and his written statement regarding the claimed inception and development of the relationship. The extent of those discrepancies cast doubt over the truthfulness of the Visa Applicant's claims and the genuineness of the parties' relationship.
26. The Delegate was not satisfied that the parties communicated with and drew a degree of emotional support from one another as could be expected of two persons who genuinely intended to live together as spouses.
27. The Delegate was also not satisfied that the Visa Applicant had applied for a partner visa based on a genuine relationship with the Review Applicant and found that circumstances indicated the application was being used as a pathway for the Visa Applicant to be granted a visa in order to be reunited with his relatives.
28. Ultimately, the Delegate was not satisfied that the prescribed criteria for granting the visa grant were met. Therefore, in accordance with s.65 of the Act, the Delegate refused to grant the Visa Applicant a partner visa.

The Tribunal's review and decision

29. On 22 September 2016, the Review Applicant lodged an application for review of the Delegate's decision by the Tribunal.
30. On 24 May 2017, the Tribunal wrote to the Review Applicant informing her that the Tribunal had considered the material before it but was unable to make a favourable decision on that material alone. The letter invited the Review Applicant to attend a hearing on 23 June 2017 to give oral evidence and present arguments.
31. On 23 June 2017, the Review Applicant attended the Tribunal hearing and gave evidence.
32. The Tribunal noted that it had before it the Department's file, the Delegate's decision record and other materials available to it from a range of sources.
33. The Tribunal's review and decision is summarised in the submissions of the Review Applicant as follows:

"21. The Tribunal accepted that the Visa Applicant (Mr Duy Toan Do) and the Sponsor (Ms Mary Le) were validly married.

22. The Tribunal was not satisfied that at the time it made its decision the Visa Applicant and the Sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others, or that their relationship was genuine and continuing (CB 290; AAT at [54 - 57]).

23. It concluded that they were not in a spousal relationship and therefore found that Mr Duy Toan Do did not meet cl.309.211 or cl.309.221 for the grant of a subclass 309 visa (CB 290; AAT at [58 - 61])."

The proceeding before this Court

34. The Review Applicant was represented before this Court by Mr Ashok Kumar, of counsel.
35. By consent, leave was granted to the Review Applicant to rely on an Amended Application filed on 17 June 2019. The Amended Application contained 2 grounds. Mr Kumar informed the Court that

the Review Applicant no longer relied on Ground 1 and withdrew any reliance on Ground 1. Ground 2 is as follows:

“Ground 2

2. The Tribunal has been procedurally unfair / breached section 360 of the Migration Act and / or failed to constructively exercise its jurisdiction.

Particulars

(a) Reg 1.15A(3)(c) require the Tribunal to constructively engage with social aspects of the relationship.

(b) The Applicant had provided references in support the social aspects of the relationship.

(c) The Tribunal determined that as the references were dated from 2015 it did not provide for Tribunal to rely on (AAT at [42 - 46] and particularly at [44 - 46].

(d) The social aspects issue was determinative / dispositive issue before the Tribunal that was dealt with on the basis that declarations / statements from were dated.

(e) No party had claimed that there was any change in relationship.

(f) The Tribunal was procedurally unfair in failing to draw attention to determinative / dispositive issue to the Applicant.

(g) The Tribunal has been procedurally unfair and breached section 360 of the Migration Act with respect to the references.

(h) In exercise of its statutory power the Tribunal was required to fully engage with the social aspects.

(i) The Tribunal committed jurisdictional error.”

36. At the heart of the Review Applicant’s complaint before this Court is that the Tribunal should have put to the Review Applicant, consistent with its obligations under s.360 of the Act, that it was relying on the fact that witness statements before it were nearly two years old and did not, therefore, provide information as to whether the relationship was continuing or any other details from mid-2015 to the time of decision.

37. Mr Kumar took the Court to the Tribunal's decision record where it stated as follows:

"These statements have been considered, however they are now nearly two-years old and do not therefore provide information as to whether the relationship is continuing or any other details of matters from mid-2015 to the time of this decision. Whilst the declarants state their support for the marriage at the time of application, they do not provide any information for the Tribunal to rely on at the time of this decision and are therefore given weight only to confirm the parties were, at the time of application married to each other."

38. True it is that was part of the reason for the Tribunal affirming the decision under review. However, the issue is whether or not the Tribunal was obliged to bring that information to the Review Applicant's attention or invite comment from the Review Applicant on that issue.

39. In considering those witness statements, the Delegate stated as follows:

"Witness statements were provided by two of the sponsor's siblings, cousins and friend, the applicant's parents, sister in law, aunt and two of the applicant's friends providing their opinions as to the nature of the relationship. When assessing the genuineness of a relationship, it is taken that the nature of the relationship according to the applicant and sponsor firsthand has greater bearing than awareness of the claimed relationship by third parties or third party opinions. For this reason, I have given limited weight to this evidence."

40. Having examined the evidence of the Visa Applicant and the Review Applicant, which obviously included those statements, the Delegate considered the evidence and information in relation to the provisions under reg.1.15A of the Regulations and determined that it was not sufficient to demonstrate that they were in a genuine and continuing spousal relationship or had a mutual commitment to a shared life together to the exclusion of all others.

41. Regulation 1.15A of the Regulations clearly sets out the matters for consideration by the decision-maker, and they include the social aspects of the relationship and the nature of the persons' commitment to each other. Section 5F of the Act, in defining "spouse", includes

satisfaction that the relationship between the parties is genuine and continuing. In considering that issue, reg.1.15A of the Regulations sets out the matters for consideration.

42. Following the Delegate's decision, the Review Applicant was invited by letter, dated 27 March 2017, to attend a case conference at the Tribunal in relation to the review.
43. The letter of invitation to the case conference informed the Review Applicant that the type of issues that would be discussed at the case conference included what kind of evidence the Review Applicant was relying on, the timeline for submission of supporting documents, whether the Review Applicant intended to bring any witnesses to the hearing and the scheduling of a hearing.
44. By letter dated 24 May 2017, the Review Applicant was informed by the Tribunal that the Tribunal had considered the material before it but was unable to make a favourable decision on that information alone. The Review Applicant was then invited to attend a hearing before the Tribunal in accordance with the relevant legislative scheme. The letter of invitation further informed the Review Applicant that in considering the review application, the Tribunal must take into account certain matters regarding the relationship between the Visa Applicant and the Review Applicant. Those matters were identified as including the financial and social aspects of the relationship, the nature of the household and the nature of each person's commitment to the relationship.
45. The letter requested that, if the Review Applicant wished to rely on any additional evidence at the hearing relevant to those matters, it should be sent to the Tribunal no later than 16 June 2017. Subsequent to that letter, the Review Applicant sent a statutory declaration in support of the review application, as did the Visa Applicant. The Tribunal in its decision record noted that at the time the visa application was made and at the time of the Tribunal's decision, the Tribunal needed to be satisfied that the Visa Applicant was the spouse as defined on the review application in terms of s.5F of the Act and reg.1.15A of the Regulations.

46. The Tribunal set out the background of the spousal relationship, and then considered in detail the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the commitment of the Review Applicant and the Visa Applicant to each other. In considering the social aspects of the relationship, the Tribunal referred to the same witness statements relied on by the Delegate.
47. Mr Kumar contended that the Review Applicant was not placed on notice that the social aspects of the relationship were a dispositive or determinative issue on the review.
48. A fair reading of the Delegate's decision makes clear that the Review Applicant was on notice that the social aspects of the relationship and the nature of the persons' commitment to each other were issues that the Review Applicant was required to satisfy the decision-maker about. The Delegate placed limited weight on the evidence in relation to the social aspects, which included the witness statements. Ultimately, the Delegate was not satisfied that a spousal relationship as defined under s.5F of the Act existed between the parties. In the circumstances, from at least the Delegate's decision, the parties were on notice that the genuineness of the spousal relationship as a whole was an issue *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [35] and [47] ("**SZBEL**").
49. In addition, as referred to above, the Review Applicant was invited to provide further evidence on at least two occasions and on one occasion with specific reference to the social aspects of the relationship. In relation to the submission that the Tribunal was obliged to raise with the Review Applicant that the evidence was two years old, and therefore was not evidence upon which the Tribunal was going to place weight, it was entirely a matter for the Tribunal the weight that it placed on any evidence placed on the evidence before it. It was entitled to have regard to the fact that the evidence before it was more than two years old in circumstances where it and the Review Applicant and the Visa Applicant were aware that the Tribunal was required to make its decision on the evidence at the time it made its decision. The Review Applicant had every opportunity to place before the Tribunal whatever evidence the Review Applicant wished to rely upon. For whatever

reason, the Review Applicant chose not to place before the Tribunal any further evidence from the witnesses relied upon before the Delegate, or any other evidence beyond that provided by the Review Applicant and the Visa Applicant.

50. Insofar as the applicant may be seeking the decision-maker's thought processes and its assessment of the evidence, that does not constitute information for the purposes of the Act (see *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 ("**SZBYR**"); SZBEL at [48]).
51. It is well established that a decision-maker's disbelief of an applicant's evidence arising from inconsistencies, a decision-maker's subjective appraisals, thought processes and determinations, defects, gaps or lack of detail in an applicant's evidence is not "*information*" that enlivens any obligation on a decision-maker to give to the applicant for comment. In *SZBYR* at [18], Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ stated as follows:

"18.Thirdly and conversely, if the reason why the Tribunal affirmed the decision under review was the Tribunal's disbelief of the appellants' evidence arising from inconsistencies therein, it is difficult to see how such disbelief could be characterised as constituting "information" within the meaning of par (a) of s 424A(1). Again, if the Tribunal affirmed the decision because even the best view of the appellants' evidence failed to disclose a Convention nexus, it is hard to see how such a failure can constitute "information". Finn and Stone JJ correctly observed in VAF v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 123 that the word "information".

"does not encompass the tribunal's subjective appraisals, thought processes or determinations...nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc".

52. (Footnotes omitted)

53. In the circumstances, the finding by the Tribunal that the witness statements did not provide any information for the Tribunal to rely on at the time of its decision, and were only given weight to confirm that

the parties were at the time of application married to each other, was open to it on the evidence material before the Tribunal for the reasons it gave.

54. The Tribunal's findings were open to it on the evidence and material before it, and for the reasons it gave, including its adverse credibility findings. The Tribunal's credibility findings were based on rational grounds and arrived at after considering those factors that were logically probative of the issue of credibility. The Tribunal's findings were not tainted by any failure to afford procedural fairness; reaching a finding without a logical or probative basis; or unreasonableness; and, were not without an intelligible foundation (see *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174 at [83] per Griffiths, Perry, Bromwich JJ).
55. That is the only issue raised by the Review Applicant in the proceeding before this Court and it does not identify any jurisdictional error on the part of the Tribunal.

Conclusion

56. A fair reading of the Tribunal's decision record makes clear that the Tribunal understood the claims being made by the Review Applicant; explored those claims with the Review Applicant at a hearing; and, had regard to all material provided in support. The Tribunal put to the Review Applicant matters of concern it had about her evidence and noted the Review Applicant's responses.
57. The Tribunal then made findings based on the evidence and material before it. Those findings of fact were open to the Tribunal on the evidence and material before it and for the reasons it gave. A fair reading of the Tribunal's decision record makes clear that the Tribunal reached conclusions based on the findings made by it and to which it applied the correct law.
58. In the circumstances, the Tribunal complied with its obligations under the statutory regime in the making of its decision, including the conduct of its review.

59. The Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act, this Court has no power to interfere.
60. Accordingly, the proceeding before this Court should be dismissed with costs.

I certify that the preceding fifty-nine (59) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Date: 21 August 2019